

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KENNETH G. WARNER
Claimant

VS.

GENERAL MOTORS CORPORATION
Self-Insured Respondent

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Docket No. **1,040,374**

ORDER

Self-insured respondent requested review of the June 14, 2010 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on October 6, 2010. Gary Terrill of Overland Park, Kansas, was assigned by the Acting Director to serve as a pro tem Board Member.¹

APPEARANCES

Hans Van Zanten of Kansas City, Missouri, appeared for the claimant. Carla Fields Johnson of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

General Motors Corporation (GM) requests review of the Administrative Law Judge's (ALJ) finding that Kenneth G. Warner suffered a work injury resulting in a 33.5 percent work disability based upon a 67 percent wage loss and 0 percent task loss through April 14, 2009, and thereafter a 50 percent work disability based upon a 100 percent wage loss and 0 percent task loss.

GM requests review of the following: (1) whether Warner's accidental injury arose out of and in the course of employment with GM; (2) whether the ALJ erred in finding a 15

¹ The assignment was necessitated by the retirement of former Board Member, Carol Foreman.

percent functional impairment; and, (3) nature and extent of disability, i.e. work disability. GM argues that Warner did not sustain his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

Warner argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Warner was employed by GM and his job was installing head liners in automobiles. He explained that the physical requirements to perform the job changed on April 4, 2008. Before that date he could install the head liner by reaching inside and feeling where to push clips to hold the head liner without getting into the car but after that date the head liners were installed with screws. And that required Warner to sit down on the bottom of the vehicle's door frame and lean inside in an awkward crunch position to use a hand drill to fasten the head liner in place. He would then get a different part and get back in the rear of the vehicle and again use a hand drill to fasten the head liner and coat hanger in place. Approximately 57 cars an hour would pass by the assembly line.

On April 4, 2008, after working several hours, Warner began to experience pain in his lower back, hip, tailbone and right leg. He advised his team leader and received a pass to the plant's medical department to be evaluated. Warner was treated with ice packs to put on his back for 20 minutes and Ibuprofen for pain. He then returned to work. The next day Warner immediately requested to be switched to a different job and he was placed in a job installing XM radios. He worked the entire shift that day.

On April 6, 2008, Warner did not work due to increased back pain. But as a result of missing work he received an inexcusable absence which resulted in a disciplinary layoff for two weeks. And after the two weeks Warner was unable to report back to work because there was a strike at the plant which lasted approximately three weeks.

Warner was seeing a psychiatrist, Dr. Todd Hill, for treatment of depression and anxiety. On April 14, 2008, he had an appointment with his psychiatrist but he did not mention anything to Dr. Hill about his work injury.

Warner sought medical treatment for his back and right leg pain with his general practitioner, Ryan Huyser, during the layoff. An MRI revealed Warner had a broad based disk bulge at L5-S1. Warner was referred to Dr. Patrick Griffith who performed three steroid injections over a three-month period. Since the steroid injections did not give Warner relief, Dr. Griffith discussed surgery and referred Warner to a surgeon. Warner was released with temporary restrictions of no repetitive bending or twisting.

After the strike Warner returned to GM but was not allowed to work because of the restrictions against repetitive bending or twisting which GM would not accommodate. During this time period, GM had offered any employee with 10 or more years service an option for a buyout. Warner testified that because Dr. Griffith told him that he could not continue working for GM, he accepted the buyout on July 1, 2008. Warner also discussed the buyout with his psychiatrist who recommended that he take the buyout because of the stress from the job but Warner never mentioned his physical injuries to the psychiatrist.

Warner then obtained a job as an IT consultant at River City Solutions which lasted until April 14, 2009.

Dr. Alexander Bailey, board certified in orthopedic surgery, examined and evaluated Warner at respondent's attorney's request. The doctor reviewed medical records and took a history from Warner who complained of low back and lower extremity pain. Physical examination on September 23, 2009, revealed Warner had exaggerated pain behavior to light touch on his lumbar spine causing him to wince in discomfort which is considered an unrealistic response to that stimuli. Dr. Bailey ordered x-rays which revealed a normal lumbar spine for Warner's age. The doctor diagnosed Warner as having low back pain and generalized depression and anxiety disorder. And Dr. Bailey concluded it was more likely that Warner was not experiencing anatomical pain but more likely due to somatization disorder.

Based on the *AMA Guides*², Dr. Bailey rated Warner's low back with no objective findings (DRE Impairment Category I) at 0 percent permanent partial impairment to the body as a whole. As to causation, the doctor opined Warner's low back pain may be exacerbated by his mental condition based on his review of the records and his physical examination.

Dr. Bailey agreed that the repetitive tasks performed by Warner can aggravate a preexisting condition such as degenerative disc disease. He further agreed that the repetitive bending, leaning, getting in and out of cars can result in herniated discs, back pain and disc tears. On cross-examination Dr. Bailey agreed that he did not know the criteria for diagnosing a somatization disorder.

Dr. P. Brent Koprivica, board certified in occupational and emergency medicine as well as an independent medical examiner, reviewed Warner's medical records at the request of claimant's counsel. On October 11, 2008, the doctor performed a physical examination and took a history from Warner. Upon physical examination, Warner complained of extreme low back pain and the doctor performed the five different Waddell's testing criteria. Warner did not appear to have a psychological overlay or be exaggerating.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The doctor found Warner had reduced motion on lumbar flexion. Dr. Koprivica diagnosed Warner as having developed diskogenic pain with anular injury at L5-S1 which accounts for the chronic pain he continues to experience and the radicular-like symptoms. Dr. Koprivica opined that Warner's physical complaints are due to his work-related accident. Warner was at maximum medical improvement for non-operative management. Based on the *AMA Guides*, Dr. Koprivica used the range of motion model to determine Warner's impairment and assigned a 15 percent whole person impairment due to motion deficits in flexion and extension.

Respondent argues Warner failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment. Respondent relies upon the fact that Warner did not mention his back injury to a psychiatrist he was seeing for depression and anxiety. Respondent argues that fact coupled with Dr. Bailey's findings demonstrates Warner did not suffer an accidental injury. The ALJ addressed Warner's failure to mention the physical injury to the psychiatrist and concluded that the failure to mention his back injury to the psychiatrist was not so unusual that it compromised his credibility. The ALJ further noted that the preponderance of the credible evidence established that Warner injured his back arising out of and in the course of his employment on April 4, 2008. The Board agrees and affirms.

Respondent next argues that Warner failed to prove he suffered functional impairment. Respondent again argues that Dr. Bailey's opinion should be adopted.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to consider the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁴

The ALJ analyzed the conflicting medical testimony between Drs. Bailey and Koprivica in the following fashion:

Based on the record, the court finds the claimant's ongoing physical complaints and limitations are more likely due to the physical injury than an unrelated psychological condition. The claimant has permanent impairment as a

³ K.S.A. 44-510e(a).

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

result of the work injury and the court adopts Dr. Koprivica's opinion of 15% functional impairment.⁵

The Board agrees and affirms. Moreover, it should be noted Dr. Bailey's reasoning that Warner's pain was due to his psychological condition is not persuasive given that Dr. Bailey did not perform any psychological testing on Warner and agreed that he did not know the diagnostic criteria for a somatization disorder.

Finally, respondent argues Warner is not entitled to a work disability. But this argument is again simply based upon the assertion that Warner did not suffer an accidental injury arising out of and in the course of his employment. Having affirmed the ALJ's finding that Warner met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment, the Board further adopts and affirms the ALJ's finding Warner suffered a 33.5 percent work disability through April 14, 2009, followed thereafter by a 50 percent work disability.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 14, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Hans Van Zanten, Attorney for Claimant
Carla Fields Johnson, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge

⁵ ALJ Award (Jun. 4, 2010) at 4.